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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

VS.

JIMMY PAUL BESSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Should Missouri courts be required to give retroactive effect to the decision of *St. Louis-Sourthwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985) in cases arising under the Federal Employers' Liability Act where the trial court has failed to instruct the jury on present value?

2. Should the "cause and prejudice" standard applied to state procedural defaults in federal habeas corpus cases be applied by analogy to the failure to request a jury instruction on present value in a civil case arising under the Federal Employers Liability Act where state jury instruction practice to the contrary had been firmly entrenched until this Court's decision in *St. Louis -Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985)?

3. Should the "clear break" exception to the general rule that an appellate court must apply new decisions retroactively be abolished in civil cases?

LIST OF PARTIES BELOW

All parties to the proceedings below are listed in the caption of this petition. Petitioner Missouri Pacific Railroad Company is a wholly owned subsidiary of the Union Pacific Corporation, a publicly traded holding company. Missouri Pacific Railroad Company's subsidiaries and affiliates are as follows:

Alameda Belt line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline, Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company

Chicago & Western Indiana Railroad Company
Chicago Heights Terminal Transfer Railroad Company
Delta Finance Company, Ltd.
Denver Union Terminal Railway
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson Railway Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Overthrust Pipe Line, Inc.

Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe line, Inc.
Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Puebleo Union Depot and Railroad Company
Quality Aggregate Company
RM Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Sacramento Northern Railway
Southern Illinois and Missouri Bridge Company
Spokane International Railroad Company
St. Joseph & Grant Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Tidewater Southern Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Railroad Company

Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industries Corporation
Upland Industrial Development Company
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited
Weatherford Mineral Wells and Northwestern Railway Company
Western Pacific Railroad Company
Winton Coal Company
WPX Freight System, Inc.
Yakima Valley Transportation Company

Respondent Jimmy Paul Besse is a citizen and resident of the State of Kansas.

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VS.

JIMMY PAUL BESSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner Missouri Pacific Railroad Company respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Missouri rendered in this action on December 16, 1986.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 721 S.W. 2d 740. It appears in the Appendix at page 1a. The opinion of the Missouri Court of Appeals, Eastern District, transferring the action to the Supreme Court of Missouri was not reported. It appears in the Appendix at page A-13. The judgment of the Circuit Court of the City of St. Louis, Missouri appears in the Appendix at page A-21.

JURISDICTION

The judgment and opinion of the Supreme Court of Missouri was rendered on December 16, 1986. No motion for rehearing was filed. This petition for a writ of certiorari was filed within 90 days of the decision below. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case arises under the Federal Employer Liability Act ("FELA"), 45 U.S.C. §51, *et. seq.* which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

The propriety of jury instructions concerning the measure of damages in FELA actions is a matter of federal common law. *Norfolk & Western R. R. Co. v. Liepelt,* 444 U.S. 490 (1980).

STATEMENT OF THE CASE

Jimmy Paul Besse was employed by Missouri Pacific as a carman in Wichita, Kansas. As a carman, Besse's duties included repairing air brakes, changing draft gears, rebuilding railroad cars and changing the wheels on railroad cars. While changing the wheels on a railroad tank car in the Wichita yard on February 24, 1977, Besse allegedly injured his back.

Besse received treatment for his back until April 11, 1977. On March 14, 1977, Besse returned to work until he was furloughed in August, 1977. He worked on a farm until he returned to work at the Wichita Car Shop in March, 1979. Besse worked

the "Wichita wheel truck" for the next twenty-eight months. This job involved essentially the same work and tools as used in the car shop, except that he was required to drive the truck to locations within a 200-mile radius of Wichita to make inspections and repairs away from the yard. Besse continued to work the Wichita wheel truck until July 17, 1981, except for one month's hospitalization for tests in November, 1980.

In May, 1979 Besse was once again treated for back pain. He continued to receive treatment into 1980. Besse was treated by various doctors in the Wichita area during 1981-82. In September 1981, Besse underwent an operation in Wichita in which a disc extrusion and fusion of L5-S1 of the lumbar spine was performed. A second fusion was performed on April 11, 1983 in Wichita.

This action was filed in the Circuit Court of the City of St. Louis, Missouri on February 13, 1980. The case was tried from October 16 to October 24, 1984. Besse claimed lost wages up to the time of trial in the sum of $100,000. Besse was 39 years old at the time of the trial. Based upon the assumption that he would have worked an additional 26 years and upon his current annual wage and fringe benefits of $37,000 per year, Besse claimed lost wages in the sum of $962,000 (26 x $37,000). There was no evidence of the present value of the alleged lost future earnings. Besse also claimed damages for pain and suffering in the sum of $625,500. The total amount of damages requested in the prayer of Besse's petition was the sum of these three figures, or $1,687,500.

In accordance with the then existing Missouri decisionin cases arising under the Federal Employers' Liability Act ("FELA"), no present value instruction was requested or given. Counsel for the parties were permitted only to argue the question of pre-

sent value to the jury.[1]

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[1] Counsel for Respondent made the following argument on damages:

> MR. FRIEDMAN: You've heard the testimony with respect to the fringe benefits, 1983, 1984 so that to the current time he's incurred over a hundred thousand dollars in loss of wage and fringe benefits and at the present time in 1984 the current level of wage loss is over $37,000 a year, and of course we know that as we go into the future that loss of wage and fringe benefits is going to continue. To age 65 it's almost a million dollars. With the current loss of wages and fringe benefits it's well over a million dollars.
>
> And that doesn't even take into consideration any increase in wages. We know the carmen wages have almost doubled in the last ten years, but not taking into account any increase in wages or any increase in cost of fringe benefits, just at the current level, so that the present value is extremely high because not taking into consideration any future increases at the present time the figures are well over a million dollars, and it's going to be incumbent upon you to decide what is a fair and reasonable sum to compensate Jimmy for the injuries and the damages that he sustained, and I've given this a great deal of thought and a great deal of consideration. I've computed what I feel is a fair and reasonable sum which I feel will reasonably and justly compensate Jimmy for the injury and damages he sustained and that is the sum of $1,687,500 and I'll tell you why I have selected that figure. That is because in determining the award in this case it's incumbent upon you not only to compensate Jimmy Besse for the last seven years of his life, for the pain, for the suffering, for anxiety, for the depression not only for the past seven years of his life but here's a 39-year old man who with the Lord's blessing will live another 40 or 50 years or more and it's incumbent upon you to compensate him not only for past seven years but on into the future for the next 30, 40 or 50 years. (Trial Transcript, Vol. III, pp. 494-495).

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Counsel for Petitioner made the following argument on damages:

> MR. TUCKER: If you're looking at the newspaper you know what you can get when you invest money these days. You can

The jury returned a verdict for the Respondent in the exact sum requested—$1,687,500—after deliberating 25 minutes. The Circuit Court entered a judgment on the jury verdict as of October 24, 1984. Petitioner filed a timely motion for new trial on November 7, 1984. On December 21, 1984, the Circuit Court overruled the motion for new trial. Petitioner filed a timely Notice of Appeal to the Missouri Court of Appeals, Eastern District on December 28, 1984.

On March 4, 1985, this Court rendered its decision in *St. Louis-Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985) *rev'g, Dickerson v. St. Louis Southwestern Ry. Co.,* 674 S.W.2d 165 (Mo. App. 1984), in which it overruled a series of recent decisions by the Supreme Court of Missouri and the Missouri Court of Appeals, Eastern District which had held that, under the system of jury instructions in Missouri, no pre-

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look in the paper and you—a Treasury Bond, long-term bond, you can get 12 percent or even a little—

[Objection overruled].

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If you took 10 percent of some savings you had and put in $50,000, you could get 5 percent a year, that works all the way up to the figure $200,000. At 10 percent, take it down to the bank, you could get $20,000 a year over long-term investment. Means after the entire time you'd still have the $50,000, the seventy-five or the hundred, $150,000, you'd still have that over the entire period of time but each year you're paid five, five thousand dollars, seventy-five hundred, ten, fifteen thousand, twenty thousand. Same goes for 12 percent, what you can earn with investing in 12 percent. If you invest $50,000 at 12 percent a year you get $6,000 a year. If you invest $100,000 at 12 percent you get $12,000. If you go up to $200,000 invested at 12 percent you get $24,000 a year. You all know that. At the end of the term of the certificate or the bond or whatever else you still have all your principal intact, you will have the $50,000 or $100,000 or $200,000. You still have that there.

Take $200,000 at 12 percent, you can get $24,000 a year at 12 percent or even 10 percent at 200,000, you get 20 percent a year, but after 5, 10, 15, 20 years you still have that $100,000 or in some cases $200,000. (Trial Transcript, Vol. III, pp. 548-549, 550).

sent value instruction could be given.[2] This Court held that the propriety of damage instructions in an FELA case was a matter of federal substantive law, not state procedural law. The Court further held that "an utter failure to instruct to the jury that present value is the proper measure of a damage award is error [and the prior Missouri instruction practice] is thus at odds with federal law." 470 U.S. at 412.

Petitioner raised the issue of the failure to give a present value instruction in its first brief in the Missouri Court of Appeals, Eastern District filed on October 23, 1985. The Missouri Court of Appeals rendered its decision on April 22, 1986. The Court of Appeals held that the record provided "conclusive [evidence] that the jury did not consider or apply present value concepts to the lost wages claim." App. at A-19. However, it transferred the appeal to the Supreme Court of Missouri because *Dickerson* was inconsistent with prior Missouri decisions and it held that the Missouri Supreme Court should rule upon whether *Dickerson* should be applied retroactively in these circumstances. App. at A-20.

Petitioner again raised the issue of the application of *Dickerson* in the Supreme Court of Missouri. The Supreme Court of Missouri affirmed the judgment of the Circuit Court. The court below did not rule directly on the retroactivity issue. Instead, it held that Petitioner waived its right to complain of the failure to give a present value instruction under state procedural law by its failure to request such an instruction, despite the fact that under state procedural law in effect at the time of trial Petitioner was not entitled to any such instruction. App. at A-8.

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[2] *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc) *cert. den. sub. nom., Burlington Northern Inc. v. Bair,* 464 U.S. 830 (1983); *Dunn v. St. Louis-San Francisco Ry. Co.*, 621 S.W.2d 245 (Mo. banc 1981), *cert. den. sub. nom., Burlington Northern R.R. Co. v. Dunn,* 454 U.S. 1145 (1982); *Brotherton v. Burlington Northern R.R. Co.*, 672 S.W.2d 133 (Mo. App. 1984); *Fisher v. Burlington Northern R.R. Co.*, 640 S.W.2d 174 (Mo. App. 1982); and *Marshell v. Burlington Northern R.R. Co.*, 637 S.W.2d 168 (Mo. App. 1982).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the clear mandate of this Court in *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985 that the "Missouri courts' refusal to allow instruction of FELA juries on present value is . . . at odds with federal law" and "an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *Id.* at 412. Petitioner respectfully requests the Court to issue a writ of certiorari to insure that the substantive federal law is followed in the State of Missouri and to insure uniform application of the FELA.

A.

Dickerson Should Be Applied Retroactively to Govern All Cases Pending on Direct Appeal At The Time It Was Rendered

The refusal of the court below to enforce Petitioner's right to a present value jury instruction conflicts not only with this Court's opinion in *Dickerson* holding that the utter failure to give such an instruction is error under federal substantive law, but also conflicts with this Court's decisions that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 281 (1969). Petitioner respectfully urges the Court to issue its writ of certiorari to insure that Missouri courts correctly apply the federal substantive law under the FELA by reviewing this decision of the Supreme Court of Missouri in conflict with this Court's prior decisions.[3] *Cf. Hankerson v. North Carolina,* 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision) and *Pittsburgh v. Alco Parking Corp.,* 417 U.S. 369, 371-372 (1974) (certiorari granted to review con-

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[3] The Missouri Court of Appeals, Eastern District recently held that *Dickerson* should not be applied retroactively. *Welsh v. Burlington Northern R. R. Co.,* 719 S.W.2d 793, 797-798 (Mo. App. 1986).

flict between decision of highest state court and Supreme Court on issue of federal law).

Where a decision is founded upon the federal substantive law, the question of whether it is to be applied retroactively to cases pending on direct appeal "is necessarily governed by federal law." *Thorpe v. Housing Authority of Durham, supra* at 281-282 (1969). The Court, well over a century and a half ago, speaking through Chief Justice Marshall stated the general federal rule in *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801):

> It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied.

There is no reason to except *Dickerson* from the general rule. The Court has long held that present value is the proper measure of damages for lost future wages in FELA cases. *Chesapeake & Ohio R. R. Co. v. Kelly,* 241 U.S. 485 (1916). The giving of damage instructions is a question of federal substantive law. *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490 (1980). Finally, there will be no inequity in applying *Dickerson* retroactively because, as this Court recognized, the exception "does not reach a private civil suit where the change does not extinguish a cause of action but merely requires a retrial on damages before a proper instructed jury." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 486 n. 16 (1981). Indeed, "considerations of fairness support retroactive application" of the rule requiring a proper damage instruction because the "failure to give the instruction may lead to the plaintiff recovering a windfall award." *Id.,* citing *Norfolk & Western R. R. Co. v.*

Liepelt, supra at 497-498.[4]

Respondent will not be prejudiced by a new trial on damages. His lost wages will be fully recoverable to the time of judgment and his lost future wages will be decided by the jury under proper instructions to reflect his actual pecuniary loss. Therefore, the retroactive application of *Dickerson* comports with the history and purpose of damage awards in FELA cases. Its application will achieve a just and equitable result as the court intended in *Dickerson*. A writ of certiorari should issue to resolve the conflict between decisions of the Missouri courts and this Court.

B.

The Court Should Extend By Analogy the "Cause and Prejudice" Exception to Procedural Defaults in State Courts in Cases Involving Substantive Federal Rights

The court below declined to apply *Dickerson* to the case even though *Dickerson* was rendered while the case was pending on direct appeal. The court rested its decision upon what it characterized as a state procedural ground that Petitioner did not request the giving of a present value instruction in the trial court. App. at A-8. Of course, if Petitioner had been entitled to have a present value instruction under state procedural

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[4] The likelihood of a windfall is substantial in this case. First, the plaintiff's calculations of future wage loss were based upon payment of the full amount of his wages and benefits rather than the after-tax net wages. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 537 (1983). Second, this figure of $962,000 was not reduced to present value. The potential windfall ranges from $486,000 (using a 6% discount factor) to $668,000 (using a 12% factor). *See* Am. Jur. 2d *Desk Book,* Item No. 128, pp. 415, 439 (present value tables). The court below assumed the jury considered future inflation and that it offset any reduction to present value. App. at A-8. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer, supra* at 544-551 ("total offset" theory of damages resting on assumption that present value calculation offset by inflation rejected under federal law).

law, its failure to make such a request would be a waiver. But in this case Petitioner was not entitled to such an instruction under decisions of the Supreme Court of Missouri. It was the erroneous interpretation of the FELA by the court below in prior decisions which induced the very inaction which the court described as a waiver. Such an inequitable result should not be allowed to stand.

This Court has not permitted the States courts evade the enforcement of substantive federal rights by attempting to cloak their decisions in asserted grounds of State procedure. This has been particularly true in FELA cases. For example, in *Brown v. Western Ry.*, 338 U.S. 294 (1949) the Court held that federal rights are "not to be defeated under the name of local practice" by application of strict state pleading rules. *Dickerson* itself affirmed this principle. 470 U.S. at 411.

A failure to raise a jury instruction issue in the trial court is not invariably a bar to its consideration on appeal. In federal habeas corpus cases, the Court has applied a "cause and prejudice" standard to claims of error in which a defendant commits a procedural default in state court.

For example, in *Reed v. Ross,* 468 U.S. 1 (1984), a defendant was convicted of murder in a North Carolina state court in 1969. The defendant claimed lack of malice and self-defense. The trial court instructed the jury that defendant had the burden of proof on these defenses. Defendant did not raise this issue on direct appeal. In subsequent decisions, this Court struck down as violation of due process the requirement that defendant bear the burden of proof on these issues and held that the rule should be applied retroactively. *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Hankerson v. North Carolina,* 432 U.S. 233 (1977).

Defendant challenged the jury instructions for the first time in a 1977 federal habeas corpus proceeding. The question in *Reed* was whether the defendant had shown the requisite "cause

and prejudice" under the standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court noted that underlying the concept of "cause" is the notion that a defendant is bound by his tactical choices at trial, and that he cannot flout state procedures at trial and then raise the claim later. 468 U.S. at 13. With respect to *Reed*, the Court held that "cause" for failure to raise a claim may occur where a new decision disapproves a practice sanctioned in prior cases. *Id.* at 17. Whether there existed a reasonable basis for pressing a claim in this situation depends upon how direct the court's sanction of the prior practice had been, how well entrenched the practice was in the relevant jurisdiction and how strong the available support was for the opposing view. *Id.* at 17-18.

The same standard should be applied to a question of waiver of a federal substantive right in civil cases tried in state courts as a result of a default under state procedural rules because the same considerations govern both issues. Therefore, the "cause and prejudice" test should be extended to civil cases. This is particularly true where the issue only becomes apparent because of an appellate decision while the case is pending for review. *Cf. Great Northern Ry. Co. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

Petitioner meets this standard for excusing its failure to tender a present value instruction in the trial court. Prior to the institution of the pattern jury instruction system of the Missouri Approved Instructions ("MAI"), Missouri courts had permitted the trial courts in FELA to instruct juries on present value. *See, e.g., Burtch v. Wabash Ry. Co.*, 236 S.W. 338 (Mo. banc 1921). However, after MAI, the Missouri Supreme Court disapproved the practice. *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc) *cert. den. sub. nom. Burlington Northern Inc. v. Bair*, 464 U.S. 830 (1983); *Dunn v. St. Louis - San Francisco Ry. Co.*, 621 S.W.2d 245 (Mo. banc 1981) *cert. den. sub. nom. Burlington Northern Inc. v. Bair*, 464 U.S. 830 (1983); *Dickerson v. St. Louis - Southwestern Ry. Co.*, 674

S.W.2d 165 (Mo. App. 1984) [*rev'd*, 470 U.S. 409 (1985), *after remand*, 697 S.W.2d 210 (Mo. App. 1985)]; *Brotherton v. Burlington Northern R. R. Co.*, 672 S.W.2d 133 (Mo. App. 1984); *Fisher v. Burlington Northern R. R. Co.*, 640 S.W.2d 174 (Mo. App. 1982); *Marshell v. Burlington Northern R. R. Co.*, 637 S.W.2d 168 (Mo. App. 1982).

Dickerson was initially decided by the Missouri Court of Appeals on June 6, 1984. Defendant's application to transfer the case to the Supreme Court of Missouri was denied on September 11, 1984. Petitioner's case was tried from October 16-24, 1984. The instruction conference was held on October 24, 1984. The verdict was returned and the judgment entered as of that date. Pursuant to the Missouri Rules of Civil Procedure, Petitioner filed its post-trial motions on November 7, 1984.[5] The *Dickerson* petition for a writ of certiorari was filed on December 6, 1984. 53 U.S.L.W. 3485. On December 21, 1984, the trial court overruled Defendant's post-trial motions. Defendants' notice of appeal was filed on December 28, 1984. In a decision that the court below admitted came as a surprise to most Missouri lawyers, App. at A-7, this Court granted certiorari in *Dickerson* and summarily reversed in a *per curiam* decision on March 6, 1985. Petitioner raised the present value instruction issue at the first opportunity in its brief filed in the appellate courts.

Thus, at the time of trial it was firmly established in Missouri instruction practice under MAI that a present value instruction could not be given in an FELA case. The highest court in the State and the intermediate court of general appellate jurisdiction over the Circuit Court of the City of St. Louis had spoken on the issue recently and authoritatively. This Court had declined to review two of the decisions. While the denial of the peti-

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[5] Although Petitioner's post-trial motions did not raise the jury instruction issue, it did assert as error that "the verdict clearly indicates a misunderstanding upon the part of the jury as to the measure and elements of damages property warranted by the evidence." Petitioner's Motion for New Trial, ¶12.

tions for writ of certiorari in *Dunn* and *Bair* "imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), it is obviously a relevant circumstance in considering counsel's failure to raise the issue at trial. As it appeared on October 24, 1984, Missouri appellate courts were not going to allow the giving of a present value instruction. This Court had already turned down two opportunities to consider the issue. No petition for a writ of certiorari had yet been filed in *Dickerson* (and would not be until after the post-trial motion was filed in this case).[6] There was no reason to believe that the petitioner in *Dickerson* was going to meet any more success than the petitioners in *Dunn* and *Bair*.

In these circumstances, there is little question that the failure to tender a present value instruction was not a conscious tactical choice, but rather the result of complying with recent and explicit Missouri decisional law on the very point in question. It was improper for the court below to rely upon the procedural default of trial counsel, who lacked the benefit of both clairvoyance and hindsight. It is especially inequitable where the procedural default was induced by the court's own repeated misapplications of federal substantive law. To find a waiver of the *Dickerson* issue in this case would endorse a rule requiring either "extraordinary vision" or the quixotic practice of raising numerous apparently groundless issues (even in the face of explicit, recent authority to the contrary) "in the hope that some aspect might mask" a substantive right which may ultimately be uncovered by a "surprising" subsequent decision. *Engle v. Isaac*, 456 U.S. 107, 131 (1982).

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[6] Petitioner could not have amended its post-trial motions to include the present value instruction issue after the *Dickerson* petition was filed or decided because, under Missouri procedural rules, any amendments to post-trial motions filed more than fifteen days after the verdict are a nullity and preserve nothing for review. *Lloyd v. Garren*, 366 S.W.2d 341 (Mo. 1963).

C.

The "Clear Break" Exception to Retroactivity Of Decisions in Civil Cases Should Be Reexamined

The Court recognized an exception to the general rule of the *Schooner Peggy* case in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). In *Chevron,* the Court set forth a three-part test to determine whether the exception should apply in civil cases:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> * * *
>
> Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-107 (citations omitted).

The first element of the *Chevron Oil* test is a threshold requirement for the application of the remaining two elements. Only after it has been determined that the new rule establishes a "clear break" from prior law, does the Court go "on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application." *United States v. Johnson,* 457 U.S. 537, 550 n. 12 (1982). Until recently, the Court applied the "clear break" ex-

ception in both civil and criminal cases. However, in *Griffith v. Kentucky,* ____ U.S. ____, 55 U.S.L.W. 4089 (1987), the Court held that new constitutional rules must be applied retroactively to all criminal cases pending upon direct review regardless of whether it constitutes a "clear break" with prior decisions.

The Court noted in *Chevron* that "the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process [citations omitted]. But the problem is by no means limited to that area." *Id.* at 106-107. It also applies to civil cases involving nonconstitutional questions. *Id.* at 107.

Generally, there is "no distinction . . . drawn between civil and criminal litigation" in determining whether a new rule should be applied retroactively. *Linkletter v. Walker,* 381 U.S. 618, 627 (1965). The Court's opinions regarding the retroactivity of decisions in civil cases have drawn heavily by analogy on principles applied in the criminal area. *See, e.g., Chevron Oil Co. v. Huson, supra* at 106-107. There is no principled distinction to be made between criminal and civil cases in applying a "clear break" exception to the general rule of retroactivity of decisions on pending appeals. To the extent that reliance of the parties on prior decisions is a consideration, it is subsumed in the remaining two factors in *Chevron. Cf. Griffith v. Kentucky, supra,* 55 U.S.L.W. at 4092. As in *Griffith,* similarly situated civil parties are not treated the same by application of a "clear break" exception. The defendant in *Dickerson* received the benefit of the new rule in Missouri while Petitioner would not under the current civil standard. *Id.; Dickerson, after remand,* 697 S.W.2d 210 (Mo. App. 1985).

This case does not fit neatly into the *Chevron Oil* categories. *Cf. United States v. Johnson, supra* at 551. *Dickerson* did not represent a "clear break" from prior decisions of this Court, or from federal appeals courts or other state courts. *See, e.g., Chesapeake & Ohio R. R. Co. v. Kelly,* 241 U.S. 485 (1916);

Beanland v. Chicago, R. I. & P. R. R. Co., 480 F.2d 109, 115 (8th Cir. 1973); *Gannaway v. Missouri-Kansas-Texas R. R. Co.*, 575 P.2d 566 (Kan. App. 1978). It does, however, represent a "clear break" from the practice first approved in Missouri in 1981 and reaffirmed on five occasions thereafter prior to the trial of this case. Thus, to the extent a decision on retroactivity must focus on "how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it," *Reed v. Ross, supra* at 17, the clear break exception stated in the first point under the *Chevron* standard would appear to apply unless the Court abrogates it.

The Court should grant certiorari to reconsider the rule in *Chevron* as to whether the "clear break" exception should also be abolished in civil cases.

CONCLUSION

For the foregoing reasons, Petitioner Missouri Pacific Railroad Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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Dated: February, 1987

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
The Honorable Michael F. Godfrey, Judge

The plaintiff, a railroad employee working out of Wichita, Kansas, recovered a judgment of $1,687,500.00 under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), against his employing railroad in the Circuit Court of the City of St. Louis. The defendant appealed, contending (1) that the trial court should have dismissed the suit under the doctrine of *forum non conveniens,* and (2) that it is entitled to a new trial because the trial court did not give a "present value" instruction, as now required by St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985). The Court of Appeals, Eastern District, affirmed, but transferred the case here because of the instruction point. We consider both arguments as on original appeal and likewise affirm, concluding: (1) that the trial court did not abuse its discretion under the special facts of this case in declining to apply the doctrine of *forum non conveniens,* because the suit was filed at the location of the home office of the defendant and the forum is not shown to be manifestly inconvenient, and (2) that the defendant was not entitled to a present-value instruction because none was requested.

I.

The doctrine of *forum non conveniens* exists in Missouri and may be applied in FELA cases such as this one. State ex rel. Chicago, Rock Island & Pacific Railroad Co. v. Riederer, 454 S.W.2d 36 (Mo. banc 1970).

The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), was adopted by Congress to give railroad employees and other employees under its coverage a right of action against their employer for negligence. Suit may be brought in any federal court of the district in which the defendant does business, or in any state court where state venue statutes permit. 45 U.S.C. § 56 (1982). A suit brought in a state court may not be removed to the federal court in the manner of other civil actions, whatever the citizenship of the parties might be. 28 U.S.C. § 1445 (1982). The states are not at liberty to reject the jurisdiction conferred by Congress. Miles v. Illinois Cent. R. Co., 315 U.S. 698, 703 (1942). States, however, may elect to apply a doctrine of *forum non conveniens,* provided that they do not impose burdens on FELA cases which they do not apply to other civil actions. State of Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950).

In *State ex rel. Chicago, R.I. & P.R. Co. v. Riederer, supra,* we issued a writ of mandamus against a trial judge who had taken the position that he could not apply the doctrine to FELA cases. We directed him to consider the defendant's claim of *forum non conveniens,* but did not instruct him as to the result to be reached. We listed six factors for consideration, as follows:

(1) "place of accrual of the cause of action"

(2) "location of witnesses"

(3) "the residence of the parties"

(4) "any nexus with the place of suit"

(5) "the public factor of the convenience to and burden upon the court and"

(6) "the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy". *Riederer,* 454 S.W.2d at 39.

The present defendant moved for dismissal of this action pointing out that the accident sued on occurred at Wichita, Kansas, 20 miles from the plaintiff's home and 446 miles from the place of trial, that the eyewitness resided there, that the treating physicians were in Wichita, and that the only connections with St. Louis were the presence of the defendant railroad's principal office, and the office of the plaintiff's attorney there. The trial court denied the motion and writ relief was refused. The motion was renewed before the judge to whom the case was assigned for trial, and denied by him. Error was assigned in the motion for new trial.

A discussion of basic principles should be helpful. The plantiff, initially, may select the forum by filing suit in any venue allowed by law. The right of choice of forum, however, is not absolute. A suit is subject to dismissal if it is filed in a forum which is manifestly inconvenient. The court, in ruling upon the issue, may consider the convenience of the parties, as well as its own convenience. The people of Missouri are not obliged to make their courts available for lawsuits in which there is no significant Missouri nexus.

The decision on the question of dismissal for inconvenient forum involves a weighing of the factors set out in *Riederer.* For this reason, the decision is one which is largely committed to the discretion of the trial court. Discretion, however, is not synonymous with whim. The discretion is a controlled discretion. Trial courts are obliged to give attention to the doctrine and to dismiss cases which have no tangible relationship to Missouri.

An instructive case is Elliott v. Johnson, 292 S.W.2d 589 (Mo. 1956). There we held that the trial court properly dismissed a suit brought in Vernon County, Missouri arising out of an automobile accident in Crawford County, Kansas, in which all parties to the suit were residents of Kansas. The opinion said that there was an adequate forum in Kansas, and that suit was brought in Missouri only for tactical reasons. 292 S.W.2d at 593-594. The court considered it of little significance that Missouri and Kansas courts were quite experienced in applying and predicting each other's laws.[1]

Even if the trial court initially overruled a motion to dismiss for inconvenient forum and the appellate court declined to intervene by writ, review after trial is not precluded. Our writs are issued grudgingly, and not to correct discretionary rulings. Inasmuch as interlocutory appellate relief is not available, errors may be asserted on appeal so long as the claim is timely raised in the trial court. A plaintiff takes a risk by proceeding to trial after notice of the defendant's claim of inconvenient forum. *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App.3d 80, 463 N.E.2d 792, 798 (1984).

Turning to the facts of this case, there is inevitably some inconvenience when there is a long distance between the place of an accident and the place of trial. Eyewitnesses and treating physicians who are unable or unwilling to travel to the trial must be presented through the much less satisfactory method of deposition. Counsel must travel to take depositions at the place of the accident. Investigation may be more difficult, and witnesses located in investigation may not be compelled to appear at trial. There is substantial expense if witnesses are transported to the trial. Trial judges should consider dismissal

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[1] *Loftus v. Lee*, 308 S.W.2d 654 (Mo. 1958) is not inconsistent. It turns on the observation that Overland Park, Kansas is a residential suburb of Kansas City, Missouri, and holds that Jackson County is not an inconvenient forum for an accident occurring there.

when any suit for personal injuries is brought at a great distance from the place of the accident, unless there is some nexus with the place of trial.

Convenience of counsel is of minimal significance. We are confident that there is no place in the United States where excellent lawyers qualified to try personal injury cases cannot be found. Almost all American jurisdictions, furthermore, admit out-of-state counsel *pro hac vice.*

Nor is residence of expert witnesses an important consideration. It is to be expected that counsel for both sides will look for experts at or near the place of trial, wherever that may be. In a case involving a large claim, important experts will gladly travel wherever they are needed, for sufficient consideration.

Even though a contrary holding might well be sustained in the future, we are unable to conclude that the trial judges who ruled on the issue in this case can be said to have committed abuse of discretion in declining to dismiss. A controlling circumstance is that the defendant railroad company was sued in the city in which its general headquarters was located. This location may be considered its residence, and residence is one of the factors highlighted in *Riederer.* A plaintiff is invariably allowed to sue in the place of his or her residence, even though the facts giving rise to the claim happened far away. *See Koster v. American Lumbermen's Mutual Casualty Co.,* 330 U.S. 518, 524 (1947). It is seldom impermissibly inconvenient to sue a defendant at that defendant's place of residence. The defendant cites *Rozansky Feed Co. Inc. v. Monsanto Co.,* 579 S.W.2d 810 (Mo. App. 1979), in which the dismissal of a suit for *forum non conveniens* was affirmed even though one of the corporate defendants had its principal office in the county in which suit was brought. The case is distinguishable because there was also a nonresident corporate defendant. The court of appeals, furthermore, sustained an exercise of discretion, just as we do here.

Inasmuch as we now have a trial record, it is proper to consider that record in deciding whether the trial court erred in its ruling. *Barrett v. Missouri Pacific R. Co.*, 688 S.W.2d 397 (Mo. App. 1985). The two eyewitnesses testified in person. The defendant produced all but one of its witnesses live. The defendant complains of the lengthy reading of depositions, but these were of the plaintiff's witnesses and treating physicians. Doctors often testify by deposition, even in trials in their home area. We do not discern inconvenience in the trial sufficient to demonstrate abuse of discretion or require reversal.

We have given attention to two relatively recent cases in the Illinois courts which seem well considered and consistent with our view of *forum non conveniens*. *Wieser v. Missouri Pacific R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98 (1983), seems distinguishable from this case only in that the suit was not brought in the jurisdiction in which the railroad had its head office or principal place of business. The court held on interlocutory appeal that the trial court should have dismissed the suit for *forum non conveniens*.[2] *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill.App.3d 80, 463 N.E.2d 792 (1984) stressed the element of protection of the local courts in reversing with directions to dismiss, after trial, a multiplicity of suits filed in Madison County, Illinois, but arising out of the leakage of contaminated material following a train wreck in central Missouri.

We have written at some length in order to indicate that the doctrine of *forum non conveniens* is viable in Missouri as a matter of judicial policy, that the trial courts have a duty to apply it in appropriate cases, that the discretion of the trial court is

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[2] We would now question the holding in *Ingle v. Illinois Central Gulf R. Corp.*, 608 S.W.2d 76 (Mo. App. 1980), *cert. denied* 450 U.S. 916 (1981).

broad but not unlimited, and that abuse of discretion may be corrected on appeal.[3]

II.

A "present value" instruction, telling the jury in essence that a dollar paid today is worth more than a dollar to be paid in the future, has not been specifically authorized in Missouri, either in FELA cases or in other personal injury cases. *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc 1983), *cert. denied Burlington Northern, Inc. v. Bair*, 464 U.S. 830 (1983), is the latest of several of our decisions holding that there was no obligation to give such an instruction, in a FELA case, even if request is made. The Supreme Court of the United States denied certiorari in that case, as it had in other cases involving the same request.

Then, to the surprise of most Missouri lawyers, that Court accepted review of a case in which a present value instruction was requested and denied, *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d 165 (Mo. App. 1984), and held that the giving of such an instruction was mandated by federal law when requested. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

The defendant did not request a present value instruction in this case. It now argues that there has been a change in the substantive law governing the case and that it should have the benefit of that change.

We do not agree. In *Bair*, we made it clear that the claim of present value may be the subject of evidence and may be argued to the jury, as a matter of plain fact. The defendant had such a

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[3] A court which dismisses a case for *forum non conveniens* should frame its order so as to protect the plaintiff against any attempts to invoke the statute of limitations. *See Wieser v. Missouri Pacific R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98 (1983).

right in this case. It did not put on any expert testimony, but did argue extensively on present value. The principle exists, quite apart from the instruction.

Under our procedural law, the trial court need not give an instruction unless a correct instruction is prepared and requested by counsel. Federal causes are tried in state courts under state procedural rules. The Supreme Court of the United States has the ultimate right to specify the matters about which FELA juries must be instructed, but the parties must make appropriate requests.

The defendant argues that the failure so to instruct amounts to "plain error." We do not agree. The case was properly tried under the procedural rules then in effect. We sympathize with a defendant who does not make a request which would appear to be futile. But there is also a substantial interest in preserving a verdict in a case which was otherwise free from error, and in which the trial judge had absolutely no means of anticipating the requirement which our reviewing court now recognizes. We hold that the failure of a request concludes the defendant.

The defendant argues that the jury was necessarily influenced by the absence of the present value instruction because its verdict awarded the plaintiff the entire amount sought in closing argument, and that plaintiff's counsel asked for $26,000 per year for 37 years without reduction to present value. We cannot exclude the possibility that the jury considered the likelihood of future inflation, or the possibility of promotion. The trial judge allowed the verdict to stand and excessiveness is not argued before us. We are unable to say that the verdict is tainted.

The judgment is affirmed.

CHARLES B. BLACKMAR, Judge

Robertson and Rendlen, JJ., concur; Billings, J., concurs in result in separate opinion filed; Higgins, C.J. and Pritchard, Sp.J., concur in result and in separate concurring in result opinion of Billings, J.; Welliver, J., dissents in separate opinion filed. Donnelly, J., not sitting.

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

OPINION CONCURRING IN RESULT

The principal opinion recognizes and acknowledges that this suit was brought "at the location of the home office of the defendant." This fact, standing alone, forecloses any issue of *forum non conveniens.*

Because I fear some of the language found in the principal opinion would restrict the current policy of vesting discretion in the circuit courts, I cannot subscribe to such a change of policy. So long as plaintiff's selection of the forum complies with the statutes and rules governing venue, the defendant should not be permitted to select the site of suit by an expanded judicial doctrine called *forum non conveniens.* Consequently, I concur only in result.

WILLIAM H. BILLINGS, Judge

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Respondent,

v.

Missouri Pacific Railroad Company,
Appellant.

DISSENTING OPINION

I respectfully dissent. If there is such a thing as a factual situation which would justify the application of the doctrine of forum non conveniens, this would have to be the case.

I cannot join in what I perceive to be the eternal hope held out by the principal opinion to defendants. I would either follow our brothers from Illinois[1] and apply the doctrine of forum non conveniens and stop the building of our "Madison County, Illinois," or I would frankly admit that *Elliott v. Johnson,* 292 S.W.2d 589 (Mo. 1956) is an aberration among our Missouri cases, which otherwise never have applied the doctrine of forum non conveniens to any set of facts, and would overrule it.

Neither the extensive treatise, nor the purported analysis and test, make the result reached by the majority any more palpable to the defendant. The fact remains that in all of the F.E.L.A. cases reported and in the dozens of cases denied by us on application for original writs, which are not reported, this Court has never applied the doctrine of forum non conveniens to a

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[1] *Wieser v. Missouri Pacific R. Co.,* 98 Ill.2d 359, 456 N.E.2d 93 (1983).

F.E.L.A. case.[2] Our rulings have not been restricted to the single railroad which happens to have its home office in St. Louis. The city of St. Louis has been and continues to be our "Madison County, Illinois."

WARREN D. WELLIVER, Judge

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[2] *See, e.g., State ex rel. Chicago, Rock Island & Pacific R. Co. v. Riederer,* 454 S.W.2d 36 (Mo. banc 1970); *Hayman v. Southern Pacific Co.,* 278 S.W.2d 749 (Mo. 1955); *State ex rel. Southern R. Co. v. Mayfield,* 240 S.W.2d 106 (Mo. banc 1951), *overruled State ex rel. Chicago, Rock Island & Pacific R. Co. v. Riederer,* 454 S.W.2d 36 (Mo. banc 1970); *Ingle v. Illinois Central Gulf R. Co.,* 608 S.W.2d 76 (Mo. App. 1980), *cert. denied,* 450 U.S. 916 (1981); *cf. Loftus v. Lee,* 308 S.W.2d 654 (Mo. 1958).

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

No. 49567

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Michael F. Godfrey, Judge

OPINION FILED:
April 22, 1986

Plaintiff, Jimmy Paul Besse, brought suit against his employer, Missouri-Pacific Railroad, under the Federal Employers' Liability Act 45 U.S.C. § 51 *et seq.* for personal injuries and lost wages arising out of a work related accident. The jury returned a verdict in favor of plaintiff for the full amount of the prayer.

Defendant, railroad, appeals claiming the trial court erred in overruling railroad's motion to dismiss for forum non conveniens and in failing to instruct the jury to reduce an award for lost future earnings to present value.

Plaintiff was employed by the railroad as a carman in Wichita, Kansas for approximately eight and one-half years

prior to his injury. On February 24, 1977, plaintiff injured his back while changing wheels on a railroad tank car. He was depressing and pinning ride control springs with a tool known as a "butterfly bar" or "hockey stick." He was thirty-two years old at the time of injury.

From the day of the injury until trial plaintiff was treated by five doctors for lower back strain and a herniated disc. He was hospitalized five times and underwent back surgery twice. Plaintiff has suffered continuous pain since the injury, and missed numerous days from work until July 1981 when he was forced to terminate his employment with the railroad.

Plaintiff is a resident of Newton, Kansas, which is approximately twenty miles north of Wichita. He was employed and injured in Wichita. All treating physicians and hospitals are located in the Wichita area. The eyewitness to the injury was living in Fort Worth, Texas at the time of trial. Defendant, railroad, was headquartered in St. Louis, Missouri at the time of trial, however, they have facilities in Kansas and were amenable to service of process in that state.

Defendant, railroad, claims the proper forum for the lawsuit is Wichita, Kansas and the court erred in overruling defendant's motion to dismiss on grounds of forum non conveniens.

It is first noted and the parties do not dispute that venue is proper in St. Louis under both Missouri law, § 508.040 RSMo 1978, and federal law, 45 U.S.C. § 56. The doctrine of forum non conveniens cannot be applied by the trial court unless the court in which the action is filed has jurisdiction of the subject matter and venue is proper. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504 (1947).

Our courts have said that the doctrine of forum non conveniens is to be applied with caution and only upon a showing of inconvenience and when the ends of justice require it. *Loftus v. Lee,* 308 S.W.2d 654, 661 (Mo. 1958). Unless the balance of the

equities is strongly in favor of not forcing defendant to trial in Missouri, plaintiff's choice of Missouri as the forum for this litigation should not be disturbed. *Ingle v. Illinois Central Gulf R.R. Co.*, 608 S.W.2d 76, 79 (Mo.App. 1980), *cert. denied,* 450 U.S. 916 (1981).

We review this issue for abuse of discretion which occurs only if the ruling is against the logic of the circumstances and if reasonable men could not differ as to the decision. *Carwell v. Copeland,* 631 S.W.2d 669, 670-71 (Mo.App. 1982).

The factors to be weighed in making a determination whether to invoke the doctrine of forum non conveniens include the "place of accrual of the cause of action, location of the witnesses, the residence of the parties, any nexus with the place of suit, the public factor of the convenience to and burden upon the court, and the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy." *State ex rel. R.I. & P.R. v. Reiderer,* 454 S.W.2d 36, 39 (Mo. banc 1970).

At trial, plaintiff offered testimony of fourteen witnesses. Five of the eight depositions read by plaintiff at trial were plaintiff's treating physicians, the other three depositions read at trial were of plaintiff's co-workers at the time of injury. Live testimony was elicited from four expert witnesses who lived in St. Louis and a witness who was present at the time of injury and who lived in Fort Worth, Texas at the time of trial.

Railroad offered testimony of six witnesses. Only one deposition was read by railroad of a chiropractor who lived in Cassville, Missouri. Three of plaintiff's supervisors at the time of injury testified live on behalf of railroad. A non-medical expert testified, who lived in Chicago Heights, Illinois, and a medical expert from St. Louis testified for railroad.

The cause of action occurred in Wichita, Kansas, but the nature of the basic facts on causation and injury was not such

that a view of the place of the injury would be necessary or beneficial even in the unlikely and unusual event of a request for a viewing. The treating physicians were all located in the Wichita area. Plaintiff with defendant's counsel present took depositions of these witnesses who were subject to cross-examination. Plaintiff's co-workers testified by deposition again with defendant's counsel present and subject to cross-examination. Defendant offered a medical expert located in St. Louis. All other non-medical expert witnesses testified live. Four of those experts lived in St. Louis. Defendant's experts resided in Chicago Heights, Illinois and St. Louis. The only deposition defendant offered was from a chiropractor who lived in Missouri and so subject to compulsory process. It does not appear from the record that defendant was prejudiced by the location of the witness.

Defendant's home office was in St. Louis and had the ability of obtaining willing witnesses who were present at the time of the injury. We do not discern an impermissible burden upon the defendant and the court where the forum was the home office of defendant. We distinguish this case from those cases where plaintiff selects a venue in what is perceived to be one favorable to plaintiffs in terms of predicting higher verdict awards, but where defendant is not sued in the venue of its own home office.

The plaintiff may not by choice of an inconvenient forum "vex," "harass," or "oppress" the defendant by inflicting upon him expenses or trouble not necessary to his right to pursue his own remedy. *Gulf Oil Corp. v. Gilbert,* 330 U.S. at 508. Another consideration which may be primary and overriding is a finding that plaintiff's chosen forum is so unrelated to the cause of action, plaintiff's residence, and defendant's office or residence as to constitute "fraudulent procurement" i.e. harassment. Such finding is not a prerequisite to application of the doctrine but would justify dismisal. *Id.* Absent a finding of "fraudulent procurement" the court should honor the

plaintiff's choice of forum if a reasonable court could differ with the decision to dismiss. *Barrett v. Missouri Pacific Railroad Co.*, 688 S.W.2d 397, 399-400 (Mo.App. 1985).

Upon a review of the record, we are unable to find an abuse of discretion here, particularly, when the forum is the location of defendant's corporate home office, the facts of the occurrence were undisputed and the occurrence of the injury was conceded. *Higley v. Missouri Pacific R. Co.*, 685 S.W.2d 572 (Mo.App. 1985). Considering the factors as enumerated by our Supreme Court in *Riederer*, 454 S.W.2d at 39, and the facts enumerated above, this court cannot find an imbalance of equities or that the trial court's action was arbitrary and unreasonable. We would affirm the denial of dismissal for inconvenient forum.

Defendant, railroad's second point claims error by the trial court in failing to submit a jury instruction requiring the jury to reduce an award for lost future wages to present value.

At the time of trial, the trial court's submission of jury instructions was consonant with previous opinions of the Missouri Supreme Court and Court of Appeals refusing to submit present value instructions because the Missouri Approved Instructions did not call for one. *Bair v. St. Louis-San Francisco R. Co.*, 647 S.W.2d 507, 513 (Mo. banc 1983), *cert. denied, sub nom. Burlington Northern, Inc. v. Bair*, 464 U.S. 830 (1983); *Dunn v. St. Louis-San Francisco R. Co.*, 621 S.W.2d 245, 254 (Mo. banc 1981), *cert. denied, sub. nom.; Burlington Northern R. Co. v. Dunn*, 454 U.S. 1145 (1982); *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d 165 (Mo.App. 1984); *Brotherton v. Burlington Northern R.R. Co.*, 672 S.W.2d 133 (Mo.App. 1984); *Fisher v. Burlington Northern R. Co.*, 640 S.W.2d 174 (Mo.App. 1982); *Marshell v. Burlington Northern R.R. Co.*, 637 S.W.2d 168 (Mo.App. 1982). However, after judgment by the trial court and prior to this decision, the United

States Supreme Court decided *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985). The Supreme Court concluded that Missouri courts' refusal to submit an instruction on present value is at odds with federal law. *Id.* at 412.

FELA cases adjudicated in state courts are to apply the state's procedural rules but the substantive law governing them is federal. *Id.* at 411. It is now well settled that jury instructions concerning the measure of damages in FELA cases is an issue of "substance" determined by federal law. *Id., citing, Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 493 (1980).

Federal law on the issue to instruct the jury on present value was established in *Chesapeake & Ohio R. Co. v. Kelly,* 241 U.S. 485, 491 (1916). The federal courts have relied on *Kelly* as a definitive statement of the law applicable in federal cases. *See Beanland v. Chicago R.I. & P.R. Co.,* 480 F.2d 109, 115 (8th Cir. 1973). As stated, the Supreme Court's statement that Missouri courts must submit a jury instruction on reducing loss of future wages to present value did not establish a new principal of law. Therefore, the point of law established in *Dickerson* is applicable to the case at bar.

The considerations of retroactivity as enumerated in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971) and *Ingle v. Illinois Cent. Gulf R. Co.,* 608 S.W.2d 76, 82-84 (Mo.App. 1980), *cert. denied,* 450 U.S. 916 (1981), where the court applied existing federal law to Missouri cases in the absence of a Missouri Approved Instruction are absent here.

Plaintiff challenges the application of the Supreme Court's decision in *Dickerson* to this case because defendant railroad did not request an instruction on present value nor was this claim of error presented to the court in its motion for new trial. The accepted rule of law states that if a party does not request an instruction there is no trial court error [except mandatory *MAI]. Louisville & N.R. Co. v. Holloway,* 246 U.S. 525, 528 (1918).

There is no doubt that had the railroad requested an instruction to reduce future lost wages to present value the court would have denied the request which would have been affirmed on appeal. Our Supreme Court in *Bair, citing, Dunn,* said, "In *Dunn,* at p. 253, we dealt with a very similar issue and held a present value instruction *was not appropriate under* MAI. We are not persuaded that federal law requires the instruction." (emphasis added) Four Court of Appeals' decisions approved the same rule. *See Dickerson,* 674 S.W.2d 165 (Mo.App. 1984); *Brotherton,* 672 S.W.2d 133 (Mo.App. 1984); *Fisher,* 640 S.W.2d 174 (Mo.App. 1982); *Marshell,* 637 S.W.2d 168 (Mo.App. 1982). The concept of present value was not argued by defendant at trial.[1] The fact that the verdict was for the plaintiff in the full amount of the prayer is conclusive that the jury did not consider or apply present value concepts to the lost wages claim.

We are now faced with balancing the railroad's reliance on prior Missouri decisions rendered after MAI which approved refusal of the instruction versus the general rule that the railroad is precluded from claiming error when there was no request at trial.

The United States Supreme Court's decision in *Dickerson* indicates Missouri courts erred on this issue after the advent of patterned Missouri instructions. Federal law has been unwavering on this point since the *Kelly* decision in 1916. Missouri consistently followed the federal law prior to MAI. *See Burtch v.*

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[1] Railroad did make the following argument:

> If you invest 100,000 at 12 percent you get $12,000. If you go up to $200,000 invested at 12 percent you get $24,000 a year. You all know that. At the end of the term of the certificate or the bond or whatever else you still have all your principal intact, you still have the $50,000 or $100,000 or $200,000. You still have that there.

Wabash Ry. Co., 236 S.W. 338 (Mo. banc 1921) and its progeny. Cases subsequent to the advent of MAI precluded an instruction on this point.

It was expressly held in *Dunn* and *Bair* that a defendant was not entitled to a present value instruction in FELA cases although evidence and argument on the issue were never foreclosed. These decisions conflict with Missouri cases prior to MAI and *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). We are bound by *Dunn* and *Bair*, Art. 5, § 2, Missouri Constitution. Because of the conflict between previous decisions of our Supreme Court decided on substantive grounds and *Dunn* and *Bair* decided on procedural grounds, and conflict between *Dunn* and *Bair* and the *Dickerson* opinion, we certify this cause to the Supreme Court for reexamination.

KENT E. KAROHL, Presiding Judge

/s/ PAUL J. SIMON, Judge — Concurs

/s/ GARY M. GAERTNER, Judge — Concurs

APPENDIX C

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Wednesday, October 24th, 1984

Cause No. 802-00509

Division No. 6

Jimmy Paul Besse,
Plaintiff,

vs.

Missouri Pacific Railroad Company,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

It is hereby adjudged that plaintiff was damaged in the sum of $1,687,500.00.

Pursuant to the jury verdict on the claim between plaintiff and defendant for assessment of the proportions of fault for plaintiff's damage, plaintiff, Jimmy Paul Besse is 0% at fault and defendant, Missouri Pacific Railroad Company is 100% at fault.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Jimmy Paul Besse have and recover of the defen-

dant, Missouri Pacific Railroad Company the sum of ONE MILLION SIX HUNDRED EIGHTY SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($1,687,500.00) DOLLARS, with interest thereon as provided by law, together with the costs of this proceeding and that execution issue therefor.

/s/ Michael F. Godfrey
Judge

10/31/84
Date approved